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IN THE

Supreme Court of the United States

October Term, 1949

Case No. 464

O. C. WILEY & SONS, Incorporated,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, et al,
Defendants-Appellees.

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees, The Interstate Commerce Commission and the Department of Justice

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PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*,
DEFENDANTS-APPELLEES.

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees, The Interstate Commerce Commission and the Department of Justice.

This is a direct appeal from the final decision in Civil Action No. 198 (District Court for Western District of Virginia, Lynchburg Division), entered on September 3, 1949, by a specially constituted Court of three judges, established pursuant to Title 28, United States Code, dismissing appellant's petition for an order enjoining, setting aside and forever annulling the report and orders of the Interstate Commerce Commission dated June 18, 1948. The motion to affirm should be overruled and this Court should review this proceeding and grant appellant the relief sought. The orders of the Commission which the District Court affirmed should be set aside

because, among other things, (1) they interpret and enforce the provisions of a contract; (2) they take the property of appellant contrary to the due process clause; (3) they are contrary to the provisions of section 5 of the Act; and (4) they are otherwise unlawful.

STATEMENT

O. C. Wiley & Sons, Incorporated, entered into a contract with Stuart Lumber Corporation for the sale and purchase of the franchise of Stuart. However, before an application was made to the Commission for approval of the purchase and transfer of the franchise from Stuart to Wiley, a third person, John C. Fleming, Jr., entered the scene and offered Stuart $2,000.00 for the franchise, or $1,000.00 more than Stuart had agreed to sell the franchise to Wiley for, so the contract with Wiley was breached and the Commission has authorized the transfer from Stuart to Fleming of the franchise that Wiley should have and would have had, had the Commission refused to consider the application of Stuart and Fleming until the validity of the contract between Stuart and Wiley was determined. We are here seeking to get the franchise Wiley purchased.

CONTRACT IMPAIRED

It is claimed by appellees that the Commission is "not a court vested with authority to interpret and enforce the terms of contracts involving the sale of operating rights," and, therefore, the Commission is not concerned with the contract of sale entered into by Stuart Lumber Corporation and O. C. Wiley & Sons, Incorporated. The action of the Commission in considering the application of Stuart and Fleming before the validity of the contract between Stuart and Wiley had been determined was tantamount to interpreting the contract between Stuart and Wiley. Because the Commission, by indirection, has ruled that there was no valid contract between Stuart and Wiley, as the franchise, notwithstanding the valid contract of sale made by Stuart and Wiley, was awarded to Fleming. The application of Stuart and Fleming should have been held in abeyance pending final determination of the contract between Stuart and Wiley and the failure to hold

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that application in abeyance resulted in the Commission declaring that Wiley had to accept money damage in lieu of the franchise because the Commission directed that the franchise be given to Fleming, notwithstanding the contract between Stuart and Wiley. Clearly, by not giving Wiley sufficient time in which to establish the contract before awarding the franchise to Fleming, the Commission has, in fact and law, interpreted and enforced the terms of a contract without giving Wiley an opportunity to protect his interest. Not only did the Commission not consider the contract of sale between Wiley and Stuart but the Commission is here still trying to prevent Wiley from obtaining the franchise.

NO BROAD AND EXCLUSIVE ADMINISTRATIVE DISCRETION HERE

It is claimed that the Commission has broad and exclusive administrative discretion in passing upon consolidations, mergers, leases, purchases, and contracts to operate common carriers subject to the Act and, in support of that assertion of the claimed unlimited powers of the Commission, reference has been made to several Court decisions claimed to support that proposition. The claimed broad and exclusive administrative discretion is conferred upon the Commission ONLY if the transaction here considered is within the provisions of Section 5 of the Act (49 USCA 5) as paragraph 11 thereof reads, in part, as follows:

> "The authority conferred by this section shall be exclusive and plenary."

The transaction involved in this proceeding does not fall within the provisions of Section 5 of the Act because Section 5 (2) (a) of the Act provides, in part, as follows:

> "It shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b) * for two or more carriers to consolidate or merge *their* properties or *franchises* * into one corporation *." (Emphasis added).

The referred to subdivision (b) provides, in part, as follows:

"Whenever a transaction is proposed under subparagraph (a) the carrier or carriers or person seeking authority therefor shall present an application to the Commission * *. *If the Commission finds that, * *, the proposed transaction is within the scope of subparagraph (a)* *, it shall enter an order approving and authorizing such transaction * *." (Emphasis added).

Subparagraph (a) of Section 5 (2) provides that two or more carriers may consolidate or merge *their* properties or *franchises* into one company. Consequently, we must determine if the application of Stuart and Fleming was within the scope of subparagraph (a) of Section 5 of the Act before we can know the kind of discretion the Commission has in the premises. In this proceeding, Stuart Lumber Corporation had *no franchise* to sell John C. Fleming, Jr., as Stuart Lumber Corporation was under a *binding contract of sale to sell and to convey its franchise* to O. C. Wiley & Sons, Incorporated, and the contract between Stuart and Wiley was binding, as the Circuit Court of Lynchburg held that the contract was valid. In that case, the jury found as follows: "We, the jury, on the issue joined, find for the plaintiff, and fix its damages at $300.00." Therefore, Stuart could not lawfully sell a franchise that he had sold to Wiley and Stuart could not convey title to the franchise to Fleming because Stuart was legally bound to convey the franchise to Wiley. Since the jury found that there was a binding contract of sale between Stuart and Wiley, the application of Stuart and Fleming was not such a transaction as to come within the scope of subparagraph (a) of Section 5 (2) of the Act, and the Commission is without power to act in the premises.

Whether or not the Stuart-Wiley contract became merged in the final judgment is of no concern to the Commission or to the District Court, as the Commission and the District Court were dealing with the question of whether or not Stuart had, *at the time (June 18, 1948) the Commission approved the application of Stuart and Fleming,* a franchise that he could lawfully sell to Fleming. The Circuit Court of Lynchburg held that Stuart and Wiley had made a binding contract of sale by which Stuart was to sell and Wiley to buy the franchise the Commission permitted Fleming to buy from Stuart. Con-

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sequently, the transaction involved in this proceeding is such a transaction as *not to come within the scope* of subparagraph (a) of Section 5 (2) of the Act. So, in fact and law, the orders of the Commission permitting Fleming to buy from Stuart the operating rights Stuart had contracted to sell to Wiley are null and void, and the decision of the Court is contrary to law.

RES ADJUDICATA

The motion to affirm contains the following:

> "Appellees submit that, as the district court held, the decision of the Virginia Court is res adjudicata in its determination, from which no appeal was taken, that appellant was not entitled to specific performance by Stuart of the Stuart-Wiley contract and that all of appellant's rights under this contract became merged in the final judgment."

If it be true, as claimed, which we deny, that the decision of the Virginia Court is res adjudicata in its determination that appellant (Wiley) was not entitled to specific performance, still that decision will not aid the appellees here nor make the transaction of Stuart and Fleming one within the scope of subparagraph (a) of Section 5 (2) of the Act, because when the Commission acted on the application of Stuart and Fleming, the State Court had not passed upon the suit. Consequently, the orders here involved have no relation to the action the State Court took on the question of specific performance, as the State Court could not grant specific performance.

The plea of res adjudicata is not available to appellees even if that plea were good, which we deny, *because the decision of the State Court was not an adjudication of the issue of whether or not the orders of the Commission in this proceeding are lawful and proper,* as that decision is an adjudication of the fact that Stuart had contracted to sell and Wiley had contracted to purchase the franchise of Stuart. Had the State Court decreed specific performance of the contract, the State Court was powerless to require the physical transfer of the franchise from Stuart to Wiley, as that transfer

can only be authorized by the Commission. Transfer of franchises, the appellees claim in their motion to affirm, can be made only as follows:

> "Moreover, there could have been no effective transfer of those rights to appellant without the permission of the Commission. Interstate Commerce Act, Sec 5 (2) (4)."

It is clear, by the admission of the appellees, that the State Court is powerless to decree specific performance of the contract between Stuart and Wiley and that the State Court could not require the transfer of the franchise from Stuart to Wiley. Therefore, since there could have been no effective transfer by the State Court of the franchise to appellant without the permission of the Commission, the State Court was not a court of competent jurisdiction to pass upon the issue of specific performance and the State Court, by appellees' own admission, is not a court of competent jurisdiction to grant specific performance, which admission and fact make the plea of res adjudicata untenable. Therefore, by the admission of appellees, the District Court erred in law by holding that the plea of res adjudicata was good and appellant barred from relief.

BY INDIRECTION

The decision of the State Court finding that a valid contract was made by Stuart Lumber Corporation and O. C. Wiley & Sons, Incorporated, by which Stuart agreed to sell and Wiley agreed to purchase the franchise of Stuart renders res adjudicata the question that Stuart *did not have a franchise* that he could *lawfully* sell to Fleming, and proves that the Stuart-Fleming transaction did not come within the scope of subparagraph (a) of Section 5 (2) of the Act. To prove that Wiley and Stuart were the proper parties under Section 5 (2) (a) of the Act and to prove that Stuart and Fleming were improper parties, since the Commission would not hear Wiley on the contract between Stuart and Wiley, and since the courts could not decree specific performance, appellant had to take judgment on the law side of the Court to prove that Wiley was lawfully entitled to the franchise. Since Wiley under the admission of appellees, could not obtain specific

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performance from the State Court and since specific performance of the contract was denied by the Commission, the Commission, *by indirection*, is therefore interpreting and enforcing a contract between Wiley and Stuart. The action of the Commission in proceeding to a final conclusion in this proceeding on the application of Stuart and Fleming is directly contrary to the specific instructions of the Commission as follows:

> "* that all matters involving the interpretation of contracts and the enforcement of the terms thereof, must be left for settlement between the parties themselves or by the Courts." (Page 3, Exhibit 1).

Since the State Court could not grant specific performance and since the Commission has not made it possible for Wiley to obtain the franchise, the action of the Commission has the force and effect of enforcing the terms and conditions of the contract of purchase entered into between Wiley and Stuart. The Commission is interpreting, enforcing and impairing the terms and conditions of a contract, *by indirection*, by requiring Wiley to accept money damage in lieu of the franchise when Wiley purchased or contracted to purchase the franchise itself.

CONCLUSION

The Supreme Court of the United States should review this proceeding and grant the relief sought. The question involved is substantial insofar as appellant is concerned, in that it involves a unique item, an item that cannot be obtained in the open market and a duplicate franchise can only be obtained by proof of public convenience and necessity. The decision of the District Court and the orders of the Commission are contrary to law and of fact in that Stuart and Fleming have been considered parties within the scope of subparagraph (a) of Section 5 (2) of the Act when there was a valid contract to purchase the franchise in existence between Wiley and Stuart; that the plea of res adjudicata, upon which the appellees rely, is erroneous and not tenable because the State Court was not a court of competent jurisdiction to decree specific performance; that the Commission, with the approval of the District Court, is using the provisions of Section 5 to interpret, impair and enforce contracts of sale; that the

failure of the Commission, which the District Court has approved, to wait and hold in suspense an application for transfer of a franchise until the dispute between the parties has been settled, takes the property of Wiley without due process of law; and the Commission, contrary to law, is permitting holders of franchises to enrich themselves by permitting them to sell twice the same franchise and then permitting them to choose the purchaser to whom they will convey the franchise.

The motion to affirm, in equity and law, should be overruled and this Honorable Court should grant a review and the relief here requested and for this we pray.

Respectfully submitted,

O. C. WILEY & SONS, INCORPORATED

By: W. G. BURNETTE,
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December 2, 1949